No 30

# UNITED STATES

# CIRCUIT COURT OF APPEALS

FOR THE

# NINTH CIRCUIT

APRIL TERM, 1892

THE UNITED STATES OF AMERICA,
*Appellee,*

vs.

THE STEAM TUG "PILOT," Her Steam Engines, Boilers, Machinery, Tackle, Apparel, Furniture, Etc.,

and

JOAN OLIVE DUNSMUIR,
*Appellant.*

## BRIEF OF APPELLANT

BURKE, SHEPARD & WOODS,
*Proctors for Appellant.*

INGRAHAM & CORYELL, PRINTERS, 214 CHERRY ST., SEATTLE

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## STATEMENT OF THE CASE.

On or about four o'clock p. m. on the 2nd day of May, 1891, the steam tug Pilot, being a British tug boat registered at Victoria in British Columbia, and owned by Joan Olive Dunsmuir, the claimant and appellant in this action, spoke, in the straits of San Juan De Fuca, the American bark Valley Forge, a vessel engaged in the coal trade between San Francisco, California, and Departure Bay, British Columbia, about ten miles inside the entrance of the straits and about three miles off Port San Juan on the island of Vancouver in the Province of British Columbia.

(Record, pages 17, 18, 36.)

Said bark Valley Forge was at this time bound to Departure Bay in British Columbia to load there with coal and the captain wished to be towed to Departure Bay by way of Port Angeles, and from Departure Bay back through the straits of San Juan De Fuca to the Pacific Ocean.

(Record, pages 18, 19, 37, 38.)

Accordingly, the captain of the steam tug Pilot agreed with the captain of the Valley Forge to tow the latter from the point of meeting, about three miles off Port San Juan on the coast of Vancouver's Island in British Columbia, to Departure Bay by way of Port Angeles, and from Departure Bay back through the straits of San Juan De Fuca to the Pacific Ocean.

(Record, pages 18, 19, 37.)

At the point where the steam tug Pilot picked up the

bark Valley Forge the straits of San Juan De Fuca are twelve miles wide, half of that distance being in American waters and half in British waters.

(Record, page 18.)

All of this distance within six miles from Port San Juan would be British waters. After picking up the bark Valley Forge the tug Pilot towed the Valley Forge along the Vancouver shore, and wholly within British waters, to Race Rocks on the Vancouver shore, a distance of 38 or 40 miles. This course was taken in order to take advantage of the tide and to make the quickest time.

(Record, pages 31, 37 and 46.)

From Race Rocks the Pilot crossed with the Valley Forge to Port Angeles in the State of Washington, which lies nearly opposite, south of Race Rocks and upon the straits of San Juan De Fuca, where she arrived on the morning of the 3rd of May, 1891. The greater part of the towing over this entire distance from the point of meeting, about three miles off Port San Juan, to the port of Port Angeles, was within and upon foreign waters, being north of the middle line of the channel of the straits of San Juan De Fuca, which separates the State of Washington from Vancouver's Island. After the Valley Forge arrived at Port Angeles, the captain was unable to continue immediately to Departure Bay, and the tug Pilot thereupon cleared from the port of Port Angeles on the 3rd day of May, 1891, with the understanding between the captain of the Valley Forge

and the captain of the tug Pilot, that the latter, after towing another vessel from Departure Bay to sea, should call at Port Angeles on her return and complete the contract of towing to Departure Bay, as agreed upon by the two captains. On the 6th day of May, 1891, the tug Pilot returned to Port Angeles for the purpose of completing the towing in accordance with the contract made with the captain of the bark Valley Forge (Record, page 22), when the collector of the port of Port Angeles seized and retained the tug Pilot for fourteen days. The tug was afterwards libelled by the United States of America, and the towing and the acts aforesaid are the towing and acts referred to and complained of in the libel in this action as being in violation of Section 4370 of the Revised Statutes of the United States.

The Valley Forge was engaged in trade between San Francisco and Departure Bay, and had been towed by the tug Pilot from the sea to Departure Bay and from Departure Bay to the sea, both before and after the seizure hereinbefore described. After the seizure and detention of the tug Pilot at Port Angeles, another British tug boat named the "Lorne," came to Port Angeles, towed the Valley Forge from Port Angeles into Departure Bay, and subsequently, after being released from the custody of the collector at Port Angeles, the captain of the tug Pilot completed his contract by towing the Valley Forge from Departure Bay to the sea.

(Record, pages 22 and 38.)

## SPECIFICATION OF ERRORS.

First: The court below, the District Court of the United States for the District of Washington, erred in finding as a fact, "That on May 3, 1891, said bark Valley Forge was bound on a voyage from San Francisco, California, to Port Angeles in the State of Washington," instead of finding as a fact, and as the evidence in the case shows, that the bark Valley Forge was actually engaged in the coal trade between San Francisco, California, and Departure Bay in British Columbia, and was on May 3, 1891, actually and in fact bound on a voyage from San Francisco, California, to Departure Bay in British Columbia, for the purpose of loading there with coal. (Record, Pages 27, 29, 33, 34, 37, 39, 41 and 45.)

Second: The court erred in finding as a fact that the tug Pilot towed the bark Valley Forge from the point of meeting, to-wit, three miles off the shore of Vancouver's Island, near Port San Juan, across the strait to Port Angeles, instead of finding as a fact, and as the evidence shows, that the tug Pilot towed the bark Valley Forge from the point of meeting, about three miles off Port San Juan, for 38 or 40 miles along the shore of Vancouver's Island to Race Rocks, and thence across the straits of San Juan De Fuca to Port Angeles, a contract having been made at the time with the master of said bark Valley Forge that she should be towed by said tug Pilot, first to Port Angeles, thence to Departure Bay in British Columbia and there to load and thence again to sea. (Record, Pages 31, 37 and 46.)

Third: Said court erred in finding as a fact, "That said tug Pilot, by reason of towing said bark Valley Forge as aforesaid, became liable to the penalty of $643," levied upon her at the time of the seizure, inasmuch as the towing described in the libel in this action was within the exception of Section 4370 of the Revised Statutes, to-wit: "This Section shall not apply to any case where the towing, in whole or in part, is within or upon foreign waters."

Fourth: Said court erred in entering the decree of November 24, 1891, "That the United States do have and recover of and from said claimant Joan Olive Dunsmuir on said bond, the sum of $643, with costs of libellant" as the steam tug Pilot herein was not subject to the penalty provided in case of a violation of Section 4370 of the Revised Statutes of the United States, but was within the exception therein stated, the towing having taken place in part in foreign waters, and the whole of the towing having been in waters where the tug Pilot had a right to be, and where navigation for it and the vessel it had in tow was free and open.

Fifth: Said court erred in entering the decree of December 18, 1891, "That the United States do have and recover of and from Joan Olive Dunsmuir, the principal in said bond named, and R. Lea Barnes and Robert Croft, sureties on said bond of the claimant herein, the sum of $643, together with costs of the libellant herein," as the tug Pilot was not subject to the penalty provided in case of a violation of Section 4370 of the Revised Statutes of the United States, but was within the exception therein stated, the

towing having taken place in part in foreign waters, and the whole of the towing having been in waters where the tug Pilot had a right to be, and where navigation for it and the vessel it had in tow was free and open.

Sixth: Said court erred in not dismissing the libel herein.

Section 4370 of the Revised Statutes, or so much of it as is necessary for the decision of this case, is as follows:

"Sec. 4370. All steam tug boats not of the United States found employed in towing documented vessels of the United States plying from one port or place in the same to another, shall be liable to a penalty of fifty cents per ton on the measurement of every such vessel so towed by them respectively which sum may be recovered by way or libel or suit. This section shall not apply to any case where the towing in whole or in part is within or upon foreign waters * * * * *" (Act further to prevent smuggling and for other purposes, July 18, 1866.)

Article I of the Treaty between Great Britain and the United States in regard to limits westward of the Rocky Mountains, signed on the 15th day of June, 1846, is as follows:

"From the point on the forty-ninth parallel of north latitude, where the boundary laid down in existing treaties and conventions between the United States and Great Britain terminates, the line of boundary between the ter-

ritories of the United States and those of her Britannic Majesty shall be continued westward along the said forty ninth parallel of north latitude to the middle of the channel which separates the continent from Vancover's Island, and thence southerly through the middle of the said channel, and of Fuca's Straits, to the Pacific Ocean : *Provided, however,* That the navigation of the whole of the said channel and straits, south of the forty-ninth parallel of north latitude, remain free and open to both parties.

## POINTS.

### I.

By reference to pages 27, 29, 33, 34, 37, 39, 41 and 45 of the record, it will be seen that the actual destination of the bark Valley Forge was not to Port Angeles, but to Departure Bay in British Columbia. The testimony of Captain John J. Bennett, the Captain of the Valley Forge, was that the captain of the tug Pilot "came up along side and asked me where I was bound to and whether I wanted a tug ; I told him I was bound to Nanaimo to load with coal," and a contract was then made to tow the Valley Forge to Nanaimo, situated upon Departure Bay, by way of Port Angeles, and after the Valley Forge had loaded with coal at Nanaimo to tow her back to sea. (Record, p. 37). The Valley Forge neither loaded nor unloaded anything at Port Angeles, nor did her captain intend either to load or unload there

but she was actually in ballast and bound for Nanaimo at the time that she left San Francisco.

Knowing that the Valley Forge was engaged in the coal trade between Nanaimo and San Francisco, the captain of the tug Pilot, at the time and place of meeting, took the Valley Forge in tow for a foreign port, to-wit, Nanaimo, upon Departure Bay, and not for an American port, under an express contract of towing as above stated. (Record, pp. 27, 29, 37, 39 and 45). After the seizure of the tug Pilot the Valley Forge actually went to Nanaimo in British Columbia, loaded there with coal, and cleared for San Francisco, in accordance with her custom. (Record, pp. 33, 34, 42 and 45). The facts being as indicated in the record, it is respectfully submitted that the finding of fact that the bark Valley Forge was bound on a voyage from San Francisco, California, to Port Angeles in the State of Washington was erroneous, and that the judge of the District Court should have found as a fact that the actual distination and voyage of the bark was as the evidence shows it to be.

If, therefore, the actual destination of the bark was to a foreign port the towing was in all respects lawful, and not at all within the terms of Section 4370 of the Revised Statutes of the United States. If the captain of the Valley Forge was seeking to evade the law by not clearing for the port of his actual destination, the captain of the tug Pilot should not be held responsible for the acts of the former, and should not have been prevented from completing the towing into a foreign port, even though

it was *through* the waters of Port Angeles under the terms of his contract. The towing was to have been one continuous act from the point of meeting, about three miles off Port San Juan, to Departure Bay in British Columbia, thence back to sea. The voyage of the Valley Forge really began at San Francisco, was not finished until she reached Nanaimo upon Departure Bay in British Columbia, and had there obtained what she was to load with. The mere calling at Port Angeles did not bring her within the statute or make the tug Pilot liable for a penalty under Section 4370 of the Revised Statutes, especially as the captain of the Valley Forge may have been evading some other statute which the captain of the Pilot knew nothing of and which did not in any way concern him.

II.

The towing of the bark Valley Forge actually and necessarily began in foreign waters, about three miles off Port San Juan, and, on account of the condition of the tide, necessarily and in fact continued for forty miles in foreign waters. (Record, p. 46). It may be contended that the Valley Forge tacked across the middle of the channel of the Straits of San de Fuca for the purpose of being picked up by a British tug. This contention, however, is not supported by the evidence (Record, p. 40), as the bark had merely tacked across the middle of the channel to catch the wind, and as the captain of the Valley Forge testified that he had employed both British and American tugs to tow him into Nanaimo. He employed, as he says (Record, p. 48), "whichever came handiest," and

whichever tug he could make the best bargain with, as he actually testified at the trial, but which the reporter failed to take. (Record, p. 48). There was therefore no attempt or intention to evade Section 4370 of the Revised Statutes, and no fraud committed or attempt to be committed and, inasmuch as he was bound to a British port, to-wit, Nanaimo, he would naturally employ a British tug to do the towing, and especially as he knew that a law similar to Section 4370 prevailed in the British dominions. It seems, therefore, that the judge of the District Court erred in finding as a fact that the tug Pilot towed the bark Valley Forge from the point of meeting across the Straits to Port Angeles, when the evidence and all the facts therein showed that the towing began and continued for forty miles in foreign waters, and was a greater part of it in foreign waters. (Record, pp. 31, 37 and 46).

III.

By the treaty with Great Britain of June 15, 1846, it will be seen that the boundary line between the British possessions in British Columbia and those of the United States is clearly defined, and that this boundary line after leaving the forty-ninth parallel of north latitude runs to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly through the middle of said channel and Fuca's Straits to the Pacific Ocean. Therefore, all north of the middle of Fuca's Straits would be under the government and control of Great Britain, and hence foreign waters; and

all south of the middle of the channel would be under the government and control of the United States and hence domestic waters.

The purpose of the two countries is even more clearly expressed in their action subsequent to the award of the Emperor of Germany, dated October 21, 1872, that, "The boundary line between the Territories of Her Britannic Majesty and the United States should be drawn through the Haro Channel." On the 21st day of November, 1872, Sir Edward Thornton, in a note to Mr. Fish, said: "Earl Granville has further instructed me to propose to the Government of the United States that the work of the boundary commission, which was interrupted in 1859 should be resumed and completed by the preparation of a map or chart showing the exact position of the boundary line from the Gulf of Georgia through the Haro Channel to the Ocean, under the treaty of 1846, and the award of the Emperor of Germany." And thereupon, on the 10th day of March, 1873, Mr. Fish, in behalf of this government, and Sir Edward Thornton and Rear Admiral James Charles Prevost, in behalf of Her Britannic Majesty, signed a protocol specifically defining the exact boundary line between the two countries, through the straits in question to the Pacific Ocean, and tracing the same upon certain charts therein referred to. By treaty and by the acts of the two countries they have assumed and claimed the entire waters of the Straits of San Juan de Fuca as territorial and Mr. W. E. Hall in his work on international law, at page 140, cites this very case as one where the two nations have

divided the entire waters and assumed control of the same.

The opinion of the judge of the district court who decided this case concedes that the waters lying north of the middle of Fuca's Straits are foreign waters; for, in his opinion, he says: "By treaty stipulations the boundary between the two countries is upon a line following the middle of the strait, and all that part of it north of the middle is British water and all south of the line is American water." He concedes at the very beginning that a large part of the waters wherein the towing occurred are British waters, and therefore, it is respectfully submitted, he concedes that they are foreign waters. He continues in his opinion as follows: "But by the treaty the entire strait is free and open to both countries for purposes of navigation, so that the vessels of each are free to sail anywhere in the strait upon either side of the line." The conclusion that the judge of the district court draws from this treaty seems to us erroneous, when he states that no part of the straits can be regarded as foreign waters to either American or British vessels. These waters on either side of the middle line of the straits must, under the terms of the treaty, be under the government and control of the nations respectively named in the treaty. The waters north of the middle line are foreign waters to the United States of America, and the waters south of the middle line are foreign waters to Great Britain. Each nation, however, has given to the other the privilege of passing and repassing over the waters of the other for the purposes of navigation.

This privilege, it is respectfully submitted, is in the nature of a license, or, perhaps, of an easement, granted by the one nation to the other for the benefit of trade and navigation.

When we consider these waters with reference to Section 4370 alone, inasmuch as the distinction that is there drawn must necessarily be between foreign and domestic waters, the true construction of the treaty seems to us to be that all the waters of the Straits of Fuca that lie north of the middle of the channel must be designated as foreign waters, and all of the waters of the Straits of Fuca that lie south of the middle of the channel must be designated as domestic waters; and in construing the meaning of this statute, no such term as "common" waters could have been contemplated by the framers of the statute. For, if the waters of the Straits of Fuca can be called "common" waters in construing Section 4370 of the statute, then the waters along the northern boundary of the United States, between the States and Canada, and also the waters on the southern boundary between the United States and Mexico, must all be called *common* and the word *foreign* can mean nothing in the proviso in the statute, because, if the judge of the district court be correct, none of these waters are under the exclusive dominion of a foreign government for all purposes, and therefore are not foreign waters. Yet it is obvious that the statute was framed to meet cases of towing on these very waters and the word foreign waters as used in the proviso of Section 4370 must mean all waters lying on the other side of the dividing line

which separates the dominions of the United States and other nations, i. e., all waters which are not domestic waters and subject to the control of the home government.

If the judge of the district court is correct in his definition of foreign waters, then there would be no force to the exception in Section 4370 and no reason in making it the subject of an amendment as was done by Congress, (Feb. 25, 1867).

The word " foreign " is defined in Bouvier's Law Dictionary as that which belongs to another country, and in Rapalje & Lawrence's Law Dictionary as that which is out of a certain state, country, county, liberty, manor, jurisdiction, etc. Thus, in the law of divorce, " foreign " means anywhere out of the country or state.

An examination of the treaties with Great Britain which settled the boundary between the United States and the British possessions will show, as we think, the correctness of our contention.

By Article II of the Definitive Treaty with Great Britian of September 3, 1783, and by subsequent treaties the boundaries between the United States and the British possessions were fixed and wherever a river or lake was made the boundary between the possessions of the two nations, the middle of the river or lake was made the dividing line between the possessions of the respective nations. By Article III of the same treaty, the navigation of the river Mississippi from its source to the ocean was forever to remain free and open to the

subjects of Great Britain and the citizens of the United States.

By Article III of the treaty with Great Britain of 1794 it was "agreed that it at shall at all times be free to His Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's Bay Company only excepted) and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other. But it is understood that this article does not extend to the admission of vessels of the United States into the seaports, harbors, bays, or creeks of His Majesty's said territories; nor into such parts of the rivers in His Majesty's said territories as are between the mouth thereof, and the highest port of entry from the sea, except in small vessels trading *bona fide* between Montreal and Quebec, under such regulations as shall be established to prevent the possibility of any fraud in this respect. Nor to the admission of British vessels from the sea into the rivers of the United States, beyond the highest ports of entry for foreign vessels from the sea. The river Mississippi shall, however, according to the treaty of peace, be entirely open to both parties; and it is further agreed, that all the ports and places on its eastern side, to whichsoever of the parties belonging, may freely be resorted to and used by both parties, in as ample a manner as any

of the Atlantic ports or places of the United States, or any of the ports or places of His Majesty in Great Britain."

By Article II of the treaty with Great Britian of August 7, 1842, the boundaries between the territories of the United States and the possessions of her Britannic Majesty in North America were defined, and the last sentence of Article II is as follows : "It being understood that all water communications and all usual portages along the line of Lake Superior to the Lake of the Woods and also Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the citizens and subjects of both countries."

By Article III of the same treaty it is provided that "In order to promote the interests and encourage the industries of all the inhabitants of the countries watered by the river St. John and its tributaries, whether living within the State of Maine or in the Province of New Brunswick, it is agreed that where, by the provisions of the present treaty, the river St. John is declared to be the line of boundary, the navigation of the said river shall be free and open to both parties, and shall in no way be obstructed by either."

Section 4370 of the Revised Statutes was passed to regulate towing between the vessels of Great Britain and the United States, especially upon the Great Lakes. After the passage of the act, in 1866, a petition was presented to Congress by persons engaged in commerce upon the lakes asking that a proviso be adopted similar to the proviso

which was afterwards actually adopted on February 25, 1867. This proviso was made to remove the burden and hardship which the law of 1866 had imposed upon foreign tugs engaged in towing upon the lakes.

See Congressional Globe, 38th and 39th Sessions of Congress.

In considering and construing Section 4370, which is a penal statute, we contend, therefore, that there can be no such thing as common waters, but that the waters on each side of the boundary line between the United States and a foreign nation must be either foreign or domestic waters, and that whenever the towing is in whole or in part beyond the boundary line of the United States of America it is within foreign waters, within the exception of Section 4370, and is not a violation of Section 4370 of the Revised Statutes. The definition of the term "foreign waters," as waters under the *exclusive* dominion of a foreign government *for all purposes*, is a strict, rigid and erroneous definition. If this definition be correct, it might, with equal force, be argued that the soil of Mexico (Treaty with Mexico, December 30, 1853, Article VIII), or of some of the states of Europe which have treaties or agreements wherein they have granted to other nations the right to transport men and munitions of war across their territory in case of war, were not states foreign to the nations with which they have made such treaties or agreements, and that their soil was not foreign soil ; because, as the learned judge would contend, they do not have *exclusive* dominion over their soil for *all* purposes. As it seems to us, however, the soil of the state that makes

a treaty or agreement as referred to is foreign soil, as far as the nation with which it makes the treaty or agreement is concerned,and that the soil is under the exclusive dominion of the state making the treaty or agreement, although it may, by mere license, or, perhaps, by an easement, give another nation the right to cross its dominion for certain purposes. In international law, we think that there can be no question that the soil of a state making such a treaty or agreement would be regarded as foreign soil. In the same way, as it seems to us, there can be no question that a foreign nation which merely allows to another nation the privilege of crossing and recrossing its waters is not deprived thereby of dominion over the waters within its boundary lines, and that its waters are still foreign waters to the nation possessing the privilege, notwithstanding the existence and continuance of the privilege. So the waters of the Straits of San Juan De Fuca north of the middle of the channel, are foreign waters, subject only to the license or easement granted to American vessels to sail upon them without interference. Inasmuch, therefore, as the towing in this case began in British waters and the larger part thereof was in British waters, and hence, as the appellant contends, in foreign waters, it is respectfully submitted that the facts in this case do not show any violation of Section 4370 of the Revised Statutes, and that this section does not apply to the acts complained of, the towing being in part within and upon foreign waters.

IV.

The towing into Port Angeles was only a small part of

the entire distince over which the bark Valley Forge was to be towed. The entire contract of towing was from the point of meeting, about three miles off Port San Juan, to Departure Bay by way of Port Angeles, and from Departure Bay to sea. The destination of the Valley Forge being Departure Bay, the most of the towing, had the Pilot been allowed to continue and perform her contract, would have been, and actually was in British, and hence foreign waters, and clearly within the exception pointed out by the statute. Had not the towing been prevented by the captain of the Valley Forge, it would have been a continuous towing from the point of meeting, about three miles off Port San Juan, in British waters, thence to Port Angeles, thence to Departure Bay, and from Departure Bay to the sea. There was in this case, no evasion or attempt at evasion, of Section 4370 of the Revised Statutes of the United States by the captain of the Pilot, and no fraud was committed or intended to be committed in the matter by him. The acts done by him had been done by him before, and were justified by the exception in the statute, which seems clearly to meet a case of towing like the case in question. It might almost be said that the exception (which was the subject of an act amending the original act by which the statute became law) was framed to meet and provide for such a case as this in question If this case in question is a violation of the statute, and is not within the exception, then a strict, rigid and unreasonable construction of this statute must be adopted as the true construction; and in order to be within the exception provided for in the statute, it would be absolutely necessary

that the towing by a foreign tug should actually be from a foreign port in order to bring the towing under the exception which provides that the towing may be in part within or upon foreign waters. No such rigid construction of the statute could have been contemplated by the framers thereof, and any such construction is contrary to the spirit of the amendment to the original act. Had such been the intention of the statute, it would have been as easy to say that the towing must be wholly in foreign waters, or when in part in foreign waters must be from a foreign port, which is both unjust and unreasonable.

Moreover this cannot be the construction of the exception provided in the statute for the statute applies only to " documented vessels of the United States plying from one port or place in the same to another " and any towing from a foreign port to a port in the United States or from a port in the United States to a foreign port is entirely outside and independent of the statute.

It is contended for the appellee that the exception applies only where the towing is *necessarily* within or upon *foreign* waters, and yet where the vessel is a " vessel of the United States plying from a port or place in the same to another," it will be difficult, if not impossible, to name a place along our entire boundary or an example, where the exception can apply, provided the contention of the appellee is correct.

The present case furnishes as good an example as can be thought of where the exception can apply. The towing in this case begins in foreign waters, even within a

marine league from the shore, continues for forty miles in foreign waters and, but for the seizure of the Pilot, would have ended in a foreign port or upon the sea.

If the towing must necessarily be in foreign waters to bring it within the exception, the exception cannot apply to navigation by American vessels upon the Great Lakes (unless in a case similar to this case), because the boundary line between the possessions of the two countries being in the middle of the lakes and rivers, it will be difficult to find any lake or river where the towing could not be done on the American side of the boundary line and the exception would have little, if any, force.

V.

Port Angeles is situated on the Straits of San Juan de Fuca, nearly opposite Race Rocks and directly across the Straits of San Juan de Fuca from Vancouver's Island. Every part of the Straits of San Juan de Fuca must, under the treaty of 1846 with Great Britain, be free and open for navigation to the vessels of both Great Britain and the United States. If such is the case—and the language of Article I of the Treaty it seems to us cannot be questioned—then the vessels of each nation are free to sail anywhere, with whatever they may have in tow, in these straits, upon either side of the middle of the channel, and into every port situated upon these straits. This being the case, Section 4370 must, as it seems to us, be considered as suspended, so far as any place upon these straits is concerned, and navigation in these straits being free and open, a towing from the high seas or from

any point in foreign waters into a port upon these straits is not within the statute and hence not a violation of the same. Much less can this statute apply to a towing which, if uninterrupted, would have been only *through* the waters of Port Angeles and *through* and upon waters which have been declared by treaty to be free and open to navigation for vessels of both nations. If such is not the case, then the navigation of the Straits of San Juan de Fuca is restricted, and not free and open in accordance with the treaty. If the construction of the statute and the decision of the judge of the district court in this case be correct, the navigation of the Straits of Fuca is not free and open, and has at least one restriction upon it, to-wit: that which the learned judge has endeavored to impose by his decision under Section 4370 of the Revised Statutes. If the navigation of the Straits of San Juan de Fuca, and every part thereof, is free and open, a foreign tug can tow an American vessel from the high seas or from any point in foreign waters into any port upon these straits, and into any part of these straits or into any harbor, bay or inlet leading to the straits, without hindrance or interference. Much more, then, can a foreign tug tow an American vessel from foreign waters *through* a port in these straits and thence to a foreign port, as the tug Pilot would have done in this case if not prevented, and which actually was done by another foreign tug in completing this same towing to Departure Bay. It must be borne in mind that the towing in this case began in foreign waters, at a point within a few miles of a foreign shore; that the towing not only began

but was to terminate in a foreign port, and after the loading of the vessel was to end upon the high seas. This towing was made by way of an American port, which, by treaty between Great Britain and the United States of America, was situated upon waters which are free and open for navigation to British vessels, and the acts complained of are within the privilege conferred by the United States upon Great Britain when the former allowed to the vessels of the latter free navigation of every part of the Straits San Juan de Fuca. If, therefore, the treaty between Great Britain and the United States is still in force—and we know of nothing to the contrary—then the acts complained of, being in the exercise of a lawful right and within the express grant of the United States, cannot be a violation of Section 4370 of the Revised Statutes.

VI.

All regulations respecting navigation should not be inconsistent with any treaty now existing and still in force between Great Britain and the United States. To hold that the towing in this case, which began in foreign waters, continued mostly within foreign waters, and was to end in foreign waters, is a violation of Section 4370 of the Revised Statutes and not within the exception therein provided, is clearly a regulation inconsistent with the proviso in Article I of the treaty between Great Britain and the United States dated June 15, 1846. But the statute can be construed so that there would be no inconsistency between it and the treaty of 1846, for

the language of the statute is plain and clear, that when the towing is in whole or in part in foreign waters there is no violation of the statute, and it is only by adopting a forced and erroneous definition of the word "foreign" that any difficulty is encountered. The statute should be examined as a whole and if this and the treaty can be reconciled by a reasonable construction of each, this should be done. It is the duty of the court to administer the laws as it finds them and as they exist without straining them to reach apparent but not real evasions and mischiefs that they are not designed to remedy. If the towing in this case is in part in foreign waters it is clearly within the exceptions of the statute and the claimant is not liable for any penalty. The question whether the captain of the tug Pilot intended and designed to evade the statute must be decided by the evidence in this record and not by mere general suspicions. There is no proof that there was any intention on the part of the captain of the tug Pilot to evade the statute or to commit a fraud. On the contrary, the whole evidence shows that he was acting honestly and doing what he honestly believed he had a right to do, and what both the statute itself and the treaty of 1846 gave him, as the appellant contends, the right to do. He was doing what he and other captains, both British and American, had done before under similar circumstances, believing that they had not only a right, but express permission under the government of each nation, respectively, to do. The captain of the tug Pilot knew nothing about the papers of the Valley Forge (Record page 45), but he did know

that the latter had been, and was at that time, engaged in the coal trade between Departure Bay and San Francisco. This court, therefore, can only consider the question whether this statute has been violated, and if it has not, then the claimant is not liable for the penalty imposed and the libel should be dismissed.

VII.

A foreign tug can come into an American port and tow a vessel from it into a foreign port, and this is not within the statute. There is no difference between this case and that of a foreign tug towing an American vessel from any point in foreign waters into an American port. For example, we will suppose that an American documented vessel plying between Sitka in Alaska and Seattle in Washington voluntarily or involuntarily comes into the port of Victoria, British Columbia, and there engages a British tug to tow her to Port Angeles. There can be no question that such towing is not within the statute at all, or if it is within the statute then the proviso of Section 4370 of the Revised Statutes must apply, and if a British tug should tow such a vessel from Victoria into Port Angeles, the tug would not be liable to any penalty under the statute. But let us suppose that the towing of the American vessel plying between the same points begins a mile outside of the port of Victoria, in British waters, however, and continues to the port of Port Angeles. The cases, as it seems to us, are parallel cases ; the towing in each case begins in, and is in part within foreign waters. If, how-

ever, the decision of the District Court be correct, the latter case would not be within the exemption of the statute and the British tug would be liable to a penalty under the statute. This, as it seems to us, is not a fair or reasonable construction of the statute. It is an attempt to stretch the statute to meet a case that is clearly within the exception to the statute, and an attempt to find a remedy for a mischief, whether real or imaginary, that the statute was not designed to remedy.

VIII.

As Section 4370 of the Revised Statutes is a penal statute, it must be construed strictly and should not be so construed as to create an offence where one does not clearly exist. Therefore, all waters that are not domestic waters and under the control of the United States should, in construing this statute, be considered as foreign waters. Even the high seas, *not* being domestic waters and under the control of the United States should, in the examination of the statute, and that too a penal statute, be regarded as *foreign* waters, for the high seas, so far as this statute is concerned, are foreign waters and any steam tug boat not of the United States has a right to tow an American documented vessel upon them. If, therefore, the towing began either on the high seas or at any point in foreign waters and continued in foreign waters, especially when, as in the case of the Pilot, it was also to end in foreign waters, the presumption is against any violation of the statute and all of the facts and a sound and reasonable view of the statute is against a

construction that would make the tug liable to the penalty, as claimed in the libel. The towing in this case was a *bona fide* necessary towing in foreign waters which began in foreign waters and but for seizure would have terminated in foreign waters, without any intention or purpose on the part of the captain of the Pilot to evade the law or commit a fraud.

IX.

In the case of the Amerian tug Mogul, referred to in the evidence (record, page 51), the records of the treasury department show that the tug was seized and fined some months ago by the Canadian customs authorities for having towed a vessel from a place in the Straits of Juan de Fuca more than three miles from the shore of British Colnmbia, but on the British side of the center of the strait, to a port in British Columbia. This was clearly a violation of the Canadian statute, being a towing which began, continued and ended wholly within Canadian waters. The facts in the case of the tug Pilot are entirely different and we think clearly within the exemption in the statute of each country.

X.

The acts complained of in the libel of the appellee herein are not in violation of Section 4370 of the Revised Statutes of the United States and the libel should be dismissed with costs to the appellant.

and the decree of Nov 24, 1891 and Dec 18, 1891 should be set aside

BURKE, SHEPARD & WOODS,
*Proctors for Joan Olive Dunsmuir, Appellant.*